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IN THE

Supreme Court of the United States

October Term, 1939

No. 676

HORTON C. RORICK,

Petitioner,

vs.

DEVON SYNDICATE, LIMITED, A CANADIAN CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

H. W. FRASER,
710 Home Bank Bldg., Toledo, Ohio,
Counsel for Petitioner.

FRASER, EFFLER, SHUMAKER & WINN,
GEORGE R. EFFLER,
R. B. SWARTZBAUGH,
710 Home Bank Bldg., Toledo, Ohio,
Of Counsel.

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To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

I. STATEMENT OF CASE

On January 19, 1930, the petitioner, a resident of Toledo, Ohio, filed suit in the Common Pleas Court of Lucas County, Ohio, against the respondent, a non-resi-

dent corporation, on a claim for Four Hundred Thousand Dollars ($400,000) with interest, under a written contract. Summons was immediately issued for the defendants. (R. 2.) An affidavit in attachment and garnishment was filed with the petition and orders of attachment and garnishment were issued and served pursuant thereto. (R. 6.)

On June 27, 1930, a second affidavit was filed describing other property of respondent and orders of attachment and garnishment were issued and served pursuant thereto. (R. 12.)

On October 10, 1930, an affidavit for constructive service was filed and service by publication commenced. (R. 15.)

On December 5, 1930, the respondent appeared specially and removed the case to the District Court. (R. 18.)

On January 15, 1931, The Spitzer Rorick Trust & Savings Bank filed its answer as garnishee, stating that it was indebted to the respondent on two special deposit accounts in the amounts of $9,255.95 and $20,258.42, respectively. (R. 25.)

On January 26, 1931, the respondent still appearing specially, moved the District Court for an order quashing and discharging the attachments. (R. 26.)

On February 17, 1936, before any disposition of the foregoing motion, petitioner filed a supplemental and amended petition (R. 29), together with a supplemental affidavit in garnishment. (R. 33). The amended petition is identical to the original in all respects material to this appeal. The supplemental affidavit in garnishment,

however, described in addition certain property of the respondent not previously attached.

On April 11, 1936, the respondent again appeared specially and moved the District Court for an order discharging the attachment and garnishment secured under the supplemental affidavit. (R. 43.)

On April 22, 1936, The Spitzer Rorick Trust & Savings Bank filed a supplemental answer as garnishee, reporting that it was holding the further sum of $17,576.08 pursuant to the attachment under the affidavit filed in the District Court. (R. 44.)

The District Court held that the affidavits in attachment and garnishment filed in the state court were void, because they were acknowledged before a notary public, who, in the court's opinion, was disqualified; that they could not be amended or validated by any proceedings in the District Court after removal. Said court further held that the attachment under the affidavit filed in the District Court could not be sustained without personal service, and thereupon discharged the attachments, quashed all summons and struck the petition and amended and supplemental petition from the files. (R. 47.)

On appeal, the Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court on the specific ground that the attachments and garnishments in the state court, prior to removal, were premature and void because they were secured prior to the first publication of notice, and that an attachment could not be secured under an affidavit filed after removal without personal service. (R. 94.)

II. REASONS URGED FOR ALLOWANCE OF WRIT

(a) In holding that an attachment secured in Ohio, after the filing of a petition and the issuance of summons, but prior to the first publication of notice, is premature and void, the said Circuit Court of Appeals has taken a position which is directly and irreconcilably in conflict with the decisions of the Supreme Court of Ohio in *Seibert vs. Switzer,* 35 O. S. 661, and *Bacher vs. Shawhan,* 41 O. S. 271, and numerous lower court decisions, and has thrown the well established law of Ohio relating to attachment and garnishments involving non-residents into utter and complete chaos and confusion.

(b) The Court of Appeals erroneously construed Sections 79 and 726 of Title 28, U. S. C. A. (R. S. Sec. 646 and Sec. 915, respectively), in quashing the garnishment secured under the affidavit filed in the District Court after removal.

Wherefore, your petitioner prays that a writ of *certiorari* issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Circuit Court had in the case entitled, *"Horton C. Rorick, Appellant, vs. Devon Syndicate, Limited, Appellee,"* being Cause No. 7609 on the docket of said court, to the end that this cause may be reviewed and determined by this court as provided for by the Statutes of the United States, and that the judgment herein of said Circuit Court be reversed by this

court; and for such further relief as to this court may seem proper.

Dated February 9, 1939.

HORTON C. RORICK,
Petitioner,

By HAROLD W. FRASER,
Counsel for Petitioner.

GEORGE R. EFFLER,
R. B. SWARTZBAUGH,
Of Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES

February Term, 1939

No.....

HORTON C. ROBICK,

Petitioner,

vs.

DEVON SYNDICATE, LIMITED, A CANADIAN CORPORATION,

Respondent.

BRIEF IN SUPPORT OF FOREGOING PETITION

I. OPINIONS BELOW

The opinion of the District Court is found at page 47, *et seq.* of the record, and the opinion of the Circuit Court at page 94, *et seq.* The latter opinion is reported in ... F. (2d) ....

II. JURISDICTION

The date of the judgment to be reviewed is January 11, 1939 (R. 93), and is reviewable under Sec. 240(a) of the Judicial Code (U. S. Code, Title 28, Sec. 347), as amended by the Act of Congress approved February 13, 1925, C. 229, Sec. 1, 43 Stat. 938.

III. ARGUMENT

(a) Decision of Court Below Conflicts with Decisions of Ohio Supreme Court

The sequence of events is stated in Part I of the foregoing petition, and thus need not be repeated here.

The court below squarely held that in Ohio an attachment secured after the filing of a petition and the issuance of summons, but prior to the first publication of notice was premature and void.

This holding is directly in conflict with the following decisions of the Supreme Court of Ohio and other courts in that state.

Bacher vs. Shawhan, 41 O. S. 271;
Seibert vs. Switzer, 35 O. S. 661;
Lessee of Paine vs. Mooreland, 15 Oh. 435;
St. John vs. Parsons, 54 Oh. App. 420, 8 Oh. Op. 169, 23 Ohio Abs. 432;
Citizens National Bank vs. Union Central Insurance Co., 12 Oh. C. C. (N.S.) 401;
Royal Indemnity Co. vs. Agrios, 7 Oh. Op. 272, 22 Oh. Abs. 312.
Central Savings Bank vs. Langenbach et al., 1 Oh. N. P. 124.
See 4 Ohio Jurisprudence 68, Sec. 44.

In *Bacher vs. Shawhan*, 41 O. S. 271, *supra*, the facts are stated in the syllabus which follows:

> "1. In an action where property is attached and summons returned 'not served,' no time is fixed by statute within which service by publication must be made.

2. Hence: Where the service by publication was not completed until eight months after the return of summons, it is error to dismiss the action for an alleged want of jurisdiction by reason of such delay."

And in *Seibert vs. Switzer*, 35 O. S. 661, *supra*, there is the following syllabus:

"1. An attachment, under the civil code, is an auxiliary proceeding in an action, which may be sued out by the plaintiff, at or after the commencement of such action, by filing a petition and causing a summons to issue thereon.

2. About 11 o'clock A.M., an order of attachment was issued upon the filing of an affidavit and giving bond. It was served and returned about 3 o'clock P.M., but no petition was filed until about 6 o'clock P. M. of the same day. *Held*, that the attachment was issued without authority of law, and as against other attaching creditors and lien holders gave no priority."

At page 665, the court said:

"An action is commenced or brought, within the meaning of Sections 192 and 193, by the filing of a petition and causing a summons to issue thereon. Code, Sec. 55. Until then there is no action in which an attachment can issue.".

In *St. John vs. Parsons*, 54 Oh. App. 420, *supra*, a petition was filed and summons issued which was later returned "Not found." An affidavit was filed with the petition and an attachment levied on real estate before service by publication was begun. The language quoted below appears at page 422 of the report:

"The order of attachment will not be set aside because issued before the service by publication was begun."

There is the following paragraph in the syllabus in *Citizens Bank vs. Union Central Life Insurance Co.*, 12 Oh. C. C. (N.S.) 401, *supra*:

> "3. An action has been begun under the attachment law when the petition has been filed and summons issued thereon, and the order of attachment will not be set aside because issued before the service by publication was begun."

The syllabus in *Royal Indemnity Co. vs. Agrios*, 7 Oh. Op. 272, *supra*, follows:

> "1. An attachment may issue immediately upon the filing of the petition or any time thereafter, if grounds therefor exist so long as the petition is *bona fide* and the steps required to complete the commencement of the action are followed with due diligence."

And in *The Central Savings Bank vs. Langenbach*, 1 N. P. 124, *supra*, there is the following syllabus:

> "1. In an action where property is attached, and summons returned 'not served,' and the defendant is brought in by publication, made eight months after the return of summons, the lien of the attachment thus created will be superior to the liens of attachments issued and levied on the same property after the commencement of such action, and before said publication was made.
>
> "2. An action is not commenced alone by filing a petition and an affidavit for publication, and making publication, but *a summons must be issued* whether service can be had only by publication or not.
>
> "3. Property seized under an order of attachment issued in a case where no summons was issued, creates no valid lien on the property as against other lien holders."

The Ohio text book rule is stated in *Vol.* 4 *Oh. Jur.* 68, *Sec.* 44, as follows:

> "An attachment issued after the filing of the petition and after the issuance of the summons, is issued at or after the commencement of the action within the meaning of the statute. An attachment issued with the summons after the petition is filed, is issued at the commencement of the action."

The procedural details for securing an attachment in Ohio have been well settled, since the decision by the Supreme Court of Ohio in *Lessee of Paine vs. Mooreland,* (1846) 15 Oh. 435, *supra,* where it was expressly held that a court acquired jurisdiction in attachment by the issuing of process, predicated upon a petition, and the attaching of property under a requisite affidavit.

Ohio General Code, Sec. 11279 provides:

> "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

Ohio General Code, Sec. 11819 provides, so far as material:

> "In a civil action for the recovery of money, *at or after its commencement,* the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:" (Grounds omitted.)

The court below relies upon its decision in *Doherty vs. Cremering et al.,* 83 F. (2d) 388, and upon *Seibert vs. Switzer,* 35 O. S. 661, *supra.*

In the *Seibert* case no petition had been filed nor any summons issued when the attachment was secured, and in *Henrietta Mining & Milling Co. vs. Gardner,* 173 U. S. 123, also relied upon, the judgment below was attacked

on the ground that "the attachment was void because the writ was issued before the issuance of summons."

With all due respect, it is submitted that the language of the Circuit Court below in *Doherty vs. Cremering*, interpreting *Bacher vs. Shawhan*, 41 O. S. 271, *supra*, and *Seibert vs. Switzer*, 35 O. S. 661, *supra*, is utterly incomprehensible. The opinion fails to state when summons issued, and the court then purports to follow the rule announced in the *Seibert* case on the theory that it was not overruled by the later *Shawhan* case. Obviously, the *Shawhan* case does not overrule the *Seibert* case because the facts are entirely different and the legal principles announced are entirely consistent. But it is a mystery how the Circuit Court could find support in the *Seibert* case for its decision in *Doherty vs. Cremering*, or in its decision below. The case of *Seibert vs. Switzer* expressly holds that an attachment may be secured at any time after the filing of a petition and issuance of summons.

In short, there is absolutely no precedent to support the decision of the court below.

In spite of the fact that summons was issued at the time the petition was filed in the case at bar, bringing it within the provisions of Ohio General Code Sections 11279 and 11819, quoted *supra*, the Circuit Court has held that Ohio General Code Section 11230 is controlling. This section is quoted below:

> "An action shall be deemed to be commenced *within the meaning of this chapter*, as to each defendant, at the date of the summons which is served on him or on a co-defendant who is a joint contractor, or otherwise united in interest with

him. When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made." (Italics ours.)

Ohio General Code Section 11231 follows:

"*Within the meaning of this chapter,* an attempt to commence an action shall be deemed to be equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt be followed by service within sixty days." (Italics ours.)

Construing Ohio General Code Section 11231, the Supreme Court of Ohio in *Bacher vs. Shawhan*, 41 O. S. 271, *supra*, uses the following language at page 272:

"It will be observed that the restrictive words 'within the meaning of this chapter' confine the operation of this section to matters concerning the limitation of actions."

Both sections of the Code quoted above are in the chapter on "Limitations of Actions," and the same reasoning applies equally to Section 11230.

In *Royal Indemnity Company vs. Agrios*, 7 Oh. Op. 272, the court clearly analyzes the Ohio statutes, and holds that Ohio General Code Section 11230 has no application where a petition had been filed and summons issued.

On principle, the decision of the Circuit Court is obviously wrong. The statutes of Ohio providing for attachments involving non-resident defendants were the same in all material respects in 1860 as they are today.

See: Swan & Critchfield; Revised Statutes of Ohio (in force August 1, 1860), Vol. 2, page 1002.

Clearly the legislature never intended to require publication before an attachment. In 1860 such a requirement would have prevented a successful attachment, because there were few, if any, daily newspapers. Even under present conditions the necessity of securing an attachment and publication on the same day would be extremely difficult, if not impossible, and the absurdity of such a requirement should be self-evident.

In Ohio the attachment statutes are remedial in nature and are to be liberally construed. This is expressly provided in Ohio General Code Section 10214 and the following cases so hold:

Hart vs. Andrews, 103 O. S. 218, 132 N. E. 846;

Weirick vs. Mansfield Lumber Co., 96 O. S. 386, 117 N. E. 362;

Bridge vs. Ring, 25 Oh. App. 149, 157 N. E. 496.

(b) Decisions of the Ohio Supreme Court Are Controlling

In spite of the well established rule in Ohio that an attachment may be secured after the filing of a petition and the issuance of summons, although prior to the first publication of notice, the court below held that such an attachment is premature and void.

28 *U. S. C. A., Sec.* 724 (R. S. Sec. 914), provides:

> "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, any rule of court to the contrary notwithstanding."

The rule is now well settled that except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state as declared by its legislature in a statute or by its highest court.

Erie Railroad vs. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817;
Willing vs. Binenstock, 302 U. S. 272, 82 L. Ed. 248, 58 Sup. Ct. 175;
Mutual Life Insurance Co. vs. Johnson, 293 U. S. 335, 79 L. Ed. 398, 55 Sup. Ct. 154;
Marine Bank vs. Kalt-Zimmers, 293 U. S. 357, 79 L. Ed. 427, 55 Sup. Ct. 226;
Burns Mortgage Co. vs. Fried, 292 U. S. 487, 78 L. Ed. 1380, 54 Sup. Ct. 813.

Applying the foregoing rule, it has been repeatedly held in actions involving attachments authorized by the statutes of a state, that the federal courts apply and enforce such remedies, adopting and following the interpretation of the statutes by the highest court of the state.

Loewe vs. Savings Bank, 236 Fed. 444, aff'd 242 U. S. 357;
Perez vs. Fernandez, 202 U. S. 80, 50 L. Ed. 942, 26 Sup. Ct. 561;
Fleitas vs. Cockren, 101 U. S. 301, 25 L. Ed. 954;
Beach vs. Viles, 27 U. S. 675, 2 Peters 675;
LaVarre vs. International Paper Co., (D. C., S. C.) 37 F. (2d) 141;
Wheeling Traction vs. Pennsylvania Co., (D. C., Ohio) 1 F. (2d) 478;
Pere Marquette Railway vs. Western Dispatch, (D. C., Mich.) 284 F. 574.

It follows that the courts below were bound by the decisions of the Ohio Supreme Court in *Bacher vs. Shawhan*, 41 O. S. 271, *supra*, and *Seibert vs. Switzer*, 35 O. S. 661, *supra*, and should have followed the rule laid down in those cases that an attachment after the filing of a petition and the issuance of summons is not premature, although before publication of notice.

(c) The Decision Below Conflicts With Previous Decision of This Court

This court has held that where an action has been commenced in the state court and property attached, the plaintiff, after removal, may complete service by publication, or if not commenced, the plaintiff can commence publication.

Clark vs. Wells, 203 U. S. 164, 172, 51 L. Ed. 138, 27 Sup. Ct. 43.

In so ruling, this court necessarily held that an attachment secured after the commencement of the action, but prior to publication, was not premature and void and it has been likewise held in the following case:

Friedman Brothers Co. vs. Greaney, (D. C., N. Y.) 297 Fed. 478.

See also:

Purdy vs. Wallace Moore & Co., (C. C., Mass.) 81 Fed. 513.

(d) District Court Erred in Holding Notary Public Disqualified

The District Court held that the notary public on the affidavits filed in the state court was disqualified because

he was an employee of a partnership of which the plaintiff (petitioner) was a member. In so holding the said court clearly erred. The claim was an individual and not a partnership claim, and the notary had no other connection with the case whatsoever. (R. 61.)

The Circuit Court did not find it necessary to pass upon the point but stated that there was "persuasion" in the argument that said notary was not disqualified. (1) because he was not an attorney in the case, and (2) because to be "otherwise interested" in the case under the Ohio statute (G. C. Sec. 11532) the interest must be some "legal, material and immediate interest" in the controversy. The Circuit Court indicated the proper rule and the trial court clearly was in error.

Bevan vs. Krieger, 289 U. S. 459, 77 L. Ed. 1316, 53 Sup. Ct. 661;
Tumey vs. Ohio, 273 U. S. 510, 523, 71 L. Ed. 749, 47 Sup. Ct. 437;
Rhinelander vs. Pittsburgh Co., 15 O. C. C. (N.S.) 286.

(e) An Affidavit Improperly Acknowledged May Be Amended by a Proper Acknowledgment

Even if the affidavit filed in the state court had been defective because improperly acknowledged, or for any other reason, the defect, if any, was cured by the amended and supplemental affidavit filed in the District Court after removal.

28 U. S. C. A., Sec. 777 (R. S. Sec. 954);
Ernstein vs. Rothschild, (C. C., Mich.) 22 Fed. 61;
Booth vs. Denike, (C. C., Tex.) 65 Fed. 43;

Nevada Co. vs. Farnsworth, (D. C., Utah) 89 Fed. 164;

Bowden vs. Burnham, (C. C. A. 8) 59 Fed. 752;

Salmon vs. Mills, (C. C. A. 8) 68 Fed. 180.

The only prerequisite to an amendment is to have an action pending.

28 *U. S. C. A., Sec.* 777, provides, so far as material:

> "No summons * * * or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form, * * * and such court shall amend every such defect and want of form * * *."

The uniform rule in the United States is that an attachment affidavit, improperly acknowledged, is not a nullity and may be amended by swearing to it before another notary. It is not necessary thereafter to secure any further service of the order of attachment.

Ramsey Motor Co. vs. Wilson, (Wyo.) 30 P. (2d) 482;

Sweringen vs. Howser, 37 Kan. 126, 14 P. 436.

Frenzer vs. Phillips, 57 Neb. 229, 77 N. W. 668;

Heidelberger vs. Heidelberger, 196 App. Div. 626, 187 N. Y. S. 864.

Therefore, even if the notary on the affidavits filed in the state court had been incompetent to act, which he was not, the affidavit filed in the federal court after removal would have cured that as well as any other defect. No further service or order of attachment is necessary.

This is likewise true under 28 U. S. C. A., Sec. 777 (R. S. Sec. 954), quoted above.

(f) The Attachment Secured After Removal to the District Court Is Valid

As already shown, the courts below erred in holding that the attachments secured prior to removal were invalid.

Said courts likewise erred in holding that the attachment of $17,576.08 secured after removal under the affidavit filed in the District Court was invalid because the defendant was not personally served.

Both courts below relied upon the decision of this court in *Big Vein Coal Company vs. Read*, 229 U. S. 31; 33 S. Ct. 694; 57 L. Ed. 1053, which construes 28 U. S. C. A., Sec. 112 (R. S. Sec. 739).

That case, however, was commenced in a Federal District Court whereas the case at bar was commenced in a state court and thereafter removed by the defendant to the District Court. For this reason, entirely different considerations and principles are involved, and the rule laid down in the *Big Vein Coal Company* case is not applicable.

Under the well established practice in Ohio, more than one attachment may be secured in the same action. Thus, property may be attached under one affidavit. Afterwards, another affidavit may be filed and other assets attached thereunder. It has never been necessary to commence a new action prior to judgment merely to attach additional assets. All that is necessary is that an action be pending at the time the attachment is secured. Ohio General Code Section 11823; and see *Pope vs.*

Hibernia Insurance Co., 24 O. S. 481, *supra;* and *Leavitt vs. Rosenberg*, 83 O. S. 230, 240, *supra.*

If the attachment in the District Court would have been good had the case remained in the state court, it is good after removal. 28 U. S. C. A., Sec. 726 (R. S. Sec. 915) expressly provides that in common law causes in the District Courts the plaintiff shall be entitled to similar remedies, by attachment or other processes, against the property of the defendant, which are provided by the laws of the state in which such court is held.

The foregoing statute entitled the plaintiff in the case at bar to proceed in the same identical manner after removal as he could before. This is particularly clear since it has been held that upon removal the plaintiff will not be deprived of substantive rights and remedies afforded by the law of the state in which his action was originally commenced.

Cain vs. Commercial Publishing Co., 232 U. S. 124, 34 S. Ct. 284, 58 L. Ed. 534;
Great Southern Insurance Co. vs. Burwell, (C. C. A. 5) 12 F. (2d) 244.

The rule is also settled that a case is removed to the Federal District Court upon the filing of a sufficient petition and bond therefor in the state court.

Remington vs. Central Railway, 198 U. S. 95, 25 S. Ct. 577, 49 L. Ed. 959;
Webb vs. Southern Railway, 248 Fed. 618, cert. denied 247 U. S. 578.

In Ohio an attachment may be secured "at or after" the commencement of the action (Ohio General Code Sec. 11819). Thus, under the rule laid down by the court be-

low, although an action might be commenced and pending, the defendant could prevent an attachment of his property by filing a petition and bond for removal although it could have been secured had the action remained in the state court. The same procedure could be repeated if a new suit were filed.

To secure an attachment "at" the commencement of the action would be difficult if not impossible, especially under the ruling of the court below that an attachment secured prior to the first publication of notice is premature and void.

And to require the filing of a new suit every time additional assets of a non-resident defendant are discovered would merely result in a multiplicity of actions with several suits pending on the same claim based on the same evidence but requiring separate trials.

This court has recently held that the law to be applied in any case is the law of the state as declared by its legislature in any statute or by its highest court. See: *Erie Railroad vs. Tompkins*, 304 U. S. 64, *supra*, and other cases cited *infra* at pages 15 and 16 holding that in actions involving attachments, the federal courts will apply and enforce such remedies, adopting and following the interpretations of the statutes by the highest court of the particular state.

It is well settled that where an action has been commenced in the state court and property seized under an order of attachment, the plaintiff after removal may take such steps as may be necessary to perfect the jurisdiction of the court. In *Clark vs. Wells*, 203 U. S. 164, *supra*, and in *Friedman Bros. Co. vs. Greaney*, 297 Fed. 478, *supra*, it was held that the plaintiff could perfect jurisdiction by publication of notice after removal.

The only prerequisite to taking such steps to perfect the jurisdiction of the court following removal is to have an action pending (Ohio General Code Sec. 11819), and the only question involved, therefore, is whether or not an action was pending in the federal court at the time the garnishment under the supplemental affidavit was secured. Under the provision of Ohio General Code Section 11279, an action was pending, whether the attachments in the state court were valid or not.

In *Freeman vs. Alderson*, 119 U. S. 185, this court says, at page 187:

> "There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted."

In such an action, the right to secure an attachment may be dependent upon the continuance of the main action. But the main action is not dependent upon the validity of any particular attachment. An action might be pending which could not proceed to judgment until a valid attachment had been secured. But this does not mean that the action must necessarily fail because an attachment secured in that action proves to be invalid. On the contrary, the plaintiff may file a new affidavit and secure an attachment thereunder, and the court thereupon has jurisdiction to proceed in the action and render judgment up to an amount which can be satisfied out of the property attached.

This does not mean, however, that a court does not have control over its docket. Thus, if the plaintiff in an

action of this kind does not desire further opportunity to secure an attachment or service of process on the defendant, the court very properly may order the petition stricken. It is only because of the control which the court exercises over its docket, however, that such an action may be stricken, and not because of the invalidity of any particular attachment.

The removal statutes were not enacted by Congress to introduce confusion into the law or to deprive a litigant of remedies provided by a state through the use of highly technical rules. They were enacted, on the other hand, for the purpose of providing an impartial forum for a non-resident, and in such actions as the one at bar, the plaintiff should be permitted to take such steps to perfect the jurisdiction of the court as he would had the case remained in the state court.

CONCLUSION

Because of the questions presented, this case is of such wide general interest that this court should exercise its supervisory powers to eliminate the obvious conflict between the decision of the court below with the decisions of the Supreme Court of Ohio and prior decisions of this court, so that the law may be authoritatively defined and the erroneous result below corrected.

We respectfully submit that the attachments secured in this action can be and ought to be sustained independently of each other and that if this cause is reviewed by this court, it should result in an order reversing the court below by (1) sustaining the attachments secured in the state court; (2) sustaining the attachment secured

in the District Court after removal, and by remanding the cause to the District Court for further proceedings in accordance with law.

Respectfully submitted,

HORTON C. RORICK,
Petitioner,
By H. W. FRASER,
Counsel for Petitioner.

FRASER, EFFLER, SHUMAKER & WINN,
GEORGE R. EFFLER,
R. B. SWARTZBAUGH,
Of Counsel.